Supreme Court, U.S.
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No. 031151 DEC 18 2003

In The
Supreme Court of the United States

GARY J. MONTEFUSCO,

Petitioner,

v.

DEPARTMENT OF THE ARMY, DR. JOSEPH WESTPHAL, Secretary of the Army, as an agent of Department of the Army, EDWARD G. ELGART, Director of Acquisitions Center, Individually and as an agent of Department of the Army, WENDY McCUTCHEON, Individually and as an agent of Department of the Army, and ANDREW DELLOMO, Individually and as an agent of Department of the Army,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This matter involves a Complaint filed by the Petitioner, Gary J. Montefusco, alleging employment discrimination by the Department of the Army. The Respondents filed a notice of motion to dismiss, or in the alternative for Summary Judgment in lieu of filing an answer. At the time Respondents' motion to dismiss was filed, no discovery had been conducted and, in fact, the initial disclosures required by Federal Rule of Civil Procedure 26 had not yet taken place. Within this context, the following questions are presented:

1. Was the dismissal of Plaintiff's Complaint upon Defendant's motion for Summary Judgment without the opportunity to conduct any discovery a due process violation which affected the fundamental fairness of the proceedings?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTION PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
LEGAL ARGUMENT	7
SUPPORTING PETITION FOR WRIT OF CERTIORARI	7
CONCLUSION	10
APPENDIX	i

TABLE OF AUTHORITIES

Page

CASES

In re: Complaint of Bankers Trust Company, 752 F.2d 874 (Third Cir. 1984) 7, 10

Costlow v. United States, 552 F.2d 560 (3rd Cir. 1977) 9

DeHart v. Horton, 227 F.3d 47 (3rd Cir. 2000) 8

Froid v. Berner, 649 F. Supp. 1418 (District of New Jersey 1986) 9

In the Matter of Extradition of Sukhminder Singh, 123 FRD 108 (District of New Jersey 1987) 7

Miller v. Beneficial Management Corp., 977 F.2d 834 (3rd Cir. 1992) 9

River Edge Associates v. Metropolitan Life Insurance Company, 774 F. Supp. 897 (District of New Jersey 1991) 9

Sames v. Gable, 732 F.2d 49 (3rd Cir. 1984) 9

Skerski v. Time Warner Cable Company, 257 F.3d 273 (3rd Cir. 2001) 8

OPINIONS BELOW

The United States District Court for the District of New Jersey issued a written, unpublished opinion, which is reproduced at Appendix (App.) 7. The United States Court of Appeals for the Third Circuit issued an unpublished written opinion which is reproduced at App. 1. The Order of the United States Court of Appeals for the Third Circuit denying petition for panel re-hearing is reproduced at App. 25. The Judgment entered by the United States Court of Appeals for the Third Circuit is reproduced at App. 5.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit in this matter was filed on July 24, 2003. A timely Petition for Panel Re-Hearing was filed. The Petition for Re-Hearing was denied by Order dated September 22, 2003. A Petition for Writ of Certiorari is made pursuant to Supreme Court Rule 10(a). Respondent, the Department of the Army, engaged in wrongful discrimination in failing to promote the Petitioner in violation of the Civil Rights Act of 1964, Title VII, Section 2000 et seq. As such, the District Court's jurisdiction is predicated upon 28 U.S.C. Section 1331, 1343(a)(4) and Section 1346. A Notice of Appeal was filed From the District Court with jurisdiction being predicated upon 28 U.S.C. Section 1291. This Court has jurisdiction under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, United States Constitution, "No person shall . . . be deprived of life, liberty or property, without due process of law . . . "

STATEMENT OF THE CASE

In the spring of 1997, the Petitioner, Gary J. Montefusco, was employed as a contract specialist, GS 11 in the Acquisition Center, U.S. Army Communications-Electronics Command ("CECOM"), Fort Monmouth, New Jersey. In or about April of 1997, notice was given that applications were being accepted for promotion to contract specialist GS-12. Seventy-one (71) applicants applied for the promotion of which thirty (30) were deemed eligible and were referred to interviews.

The interviews were conducted between May 5, 1997 and May 15, 1997. The interviewees were allegedly selected for promotion based upon the scores they received after answering questions during the interview session. It has been proffered by the Respondents that a score of sixty (60) earned the applicant a promotion. Of the thirty (30) applicants who were interviewed for promotion, twenty-six (26) were selected for promotion.

Thereafter, request was made through a union representative for copies of the names and interview score sheets of all individuals who were interviewed. The Respondents refused to produce the information requested. Subsequently, notice was posted that applications were again being sought for promotion to contract specialist GS-12. The Petitioner applied and was one of five (5) people

selected for interviews, which were conducted on August 12, 1997. The Petitioner was again passed over for promotion. Only two (2) individuals out of the five (5) applicants selected for interviews were promoted. The two (2) individuals promoted were interns, both of whom were under the age of Forty (40), while the remaining three (3) applicants which were not selected were all over the age of Forty (40). The promotions were announced on August 21, 1997. The Petitioner filed an EEO Complaint on the following day alleging age discrimination arising out of the August, 1997 promotions. This resulted in an OCI investigation by the Department of the Army.

Throughout the OCI investigation resulting from Petitioner's EEO Complaint arising out of the August 1997 promotions, requests were made for the production of the scoring sheets from both the May and August interviews. Respondents, however, refused to produce the scoring sheets during that proceeding. Petitioner, thereafter made a formal request for the interview score sheets to the Department of Defense Discrimination Complaint Investigator, Joseph Simone. Mr. Simone, however, denied Petitioner's request for these documents. Following the OCI investigation, an appeal was filed with the EEOC. On February 2, 1999, Petitioner again requested the scoring sheets at issue. Respondents again refused to produce the scoring sheets. Thereafter, on February 22, 1999, Petitioner filed a motion to compel the production of these scoring sheets in the EEOC proceeding. Petitioner's motion was granted on April 26, 1999.

On or about May 7, 1999, Respondents produced the interview scoring sheets for the May, 1997 contract specialist interviews. Upon reviewing those documents, Petitioner, for the first time, discovered that his score had

been reduced following the interview and the scores of three (3) minority females had been increased. Petitioner also discovered a memo advising of the need for the CECOM to increase its minority representation. On May 11, 1999, within five (5) days of receiving the documentation from the Respondents, Petitioner contacted an EEO officer and thereafter filed a Complaint of discrimination based upon race discrimination. The EEO Formally accepted the Complaint on November 8, 1999, over Respondents' objection based upon the timeliness of the initiation of the administrative proceeding. Following the conclusion of the EEO proceedings, Petitioner Filed a Complaint in the United States District Court For the District of New Jersey on or about November 16, 2000. Petitioner's Complaint alleged employment discrimination against Respondents under the Civil Rights Act of 1964, Title VII, Section 2000 et seq.

The Respondents were served and on or about March 14, 2001, a Notice of Motion for Summary Judgment dismissing the Complaint as to the individual Respondents, Edward G. Elgart, Wendy McCutcheon and Andrew Dellomo was filed in lieu of an answer. Petitioner thereafter stipulated to the dismissal of those parties. On May 1, 2001, the Respondents filed an application extending time to answer on behalf of the Department of the Army and Dr. Joseph Westphal, Secretary of the Army. On May 4, 2001, Respondents filed a Notice of Motion to Dismiss or in the alternative for summary judgment as to those parties based upon the Petitioner's alleged failure to exhaust his administrative remedies.

At this stage in the proceedings, the Respondents had not filed an answer, nor had any discovery been conducted.

In fact, the initial disclosures required by Federal Rule of Civil Procedure 26 had not yet taken place.

In defense of the Respondents' Motion to Dismiss for Failure to timely exhaust administrative remedies, Petitioner asserted the Doctrine of Equitable Tolling. In granting Respondents' Motion to Dismiss the District Court found that the Doctrine of Equitable Tolling could not be invoked in this matter, as the Petitioner knew or should have known of the discrimination at the time of his non-promotion in May of 1999. The District Court specifically found,

> Plaintiff misconstrues his "injury" when he argues that Defendants' refusal to provide the scoring sheets caused his non-compliance with the statutory limitations. Plaintiff's injury is indisputably his non-selection for the position in May of 1997; and Defendants did not mislead him as to that information. Plaintiff learned in May of 1997 that he was not selected at the same time he learned who was selected, and he knew the selectees race and gender as well. [citation omitted] Even assuming that Defendant acted in bad faith by refusing to produce the score sheets until 1999, Plaintiff cannot be heard to argue that he did not suspect Defendants alleged racially and sexually discriminatory motives until May, 1999, almost two (2) years after the expiration of the period he had to contact the EEOC. See District Court's opinion.

Based upon these findings, the Court Found as a matter of law that the Doctrine of Equitable Tolling was inapplicable and dismissed Petitioner's Complaint specifically finding, "Because there is no basis for equitable

tolling in this matter, the Court may not reach the merits of Defendant Secretary's Summary Judgment motion.

Appeal was taken to the United States Court of Appeals for the Third Circuit. The Court of Appeals disagreed with the District Court's analysis that Petitioner knew or should have known of the racial discrimination at the time of his non-selection. The Court of Appeals, however, affirmed the decision holding that, "There is no evidence that the test sheets, containing the alleged suspicious erasures were withheld willfully." The Court of Appeals then proceeded to make certain factual findings as follows:

> We observed that Montefusco has produced naught but his own lay analysis of the erasures and their import. We are constrained to resolve motions for Summary Judgment on reliable evidence . . . however, we are unwilling to allow this case to proceed to trial based exclusively on a Plaintiff's own personal assessment that the erasures favored minority applications over his application, without any expert testimony – or for that matter, any objective assessment whatsoever – to ascertain the nature of the erasures, which applicants had scores erased, whether the scores were changed up or down, or the statistical significance of these alterations. Absent any trustworthy evidence to show that there was a disproportionate number of erasures on the score sheets of Montefusco and two (2) African American woman applicants, or that the scores were altered to Montefusco's detriment and to the two (2) women's benefit, we cannot ascribe any nefarious purpose to the government's withholding

of the sheets. Equitable Tolling, therefore, does not apply.

LEGAL ARGUMENT

SUPPORTING PETITION FOR WRIT OF CERTIORARI

It is submitted that the Petitioner, Gary J. Montefusco, was denied the due process of law in that he was not permitted to conduct any discovery prior to the dismissal of his Complaint. The due process clause of the Fifth Amendment provides that, "No person shall . . . be deprived of life, liberty or property, without due process of law . . . " U.S. CONST. Amend. V.

Due process guarantees that there is a fair decision making process before official action is taken which directly impairs a person's life, liberty or property. See *In the Matter of Extradition of Sukhminder Singh*, 123 FRD 108 (District of New Jersey 1987) (Quoting *In re: Complaint of Bankers Trust Company*, 752 F.2d 874, 886 (3rd Cir. 1984). In *Singh,* the Court noted that although a litigant has no general constitutional right to discovery, there may be circumstances under which discovery must be afforded as a matter of due process. *Id.* at 126.

In the case *Sub Judice*, the District Court granted Respondents' Motion to Dismiss based upon the Doctrine of Equitable Tolling as a matter of law and, therefore, as indicated in the District Court's opinion, never reached the substantive aspects of Defendant's Motion for Summary Judgment. On Appeal, the Third Circuit Court of Appeals disagreed with the District Court's analysis as to the first prong of the Equitable Tolling Doctrine, but affirmed the

decision after making a series of factual determinations. Based upon the opinion of the Third Circuit Court of Appeals, it appears that they decided the matter as a Motion for Summary Judgment. The Third Circuit specifically commented upon the lack of any expert or other objective evidence submitted by the Petitioner. It is submitted that the decision of this matter as a Motion for Summary Judgment based upon the factual findings made by the Third Circuit Court of Appeals specifically violated the Petitioner's due process rights.

As previously set forth, the Respondents' motion was filed in lieu of an answer and as such, no discovery had been conducted. As the Respondents never filed an answer initial discovery in accordance with Civil Rule of Procedure 26 was never exchanged. Accordingly, the Petitioner never had an opportunity to serve any Interrogatories or take any depositions, let alone obtain expert analysis in conjunction with his claims.

As the Court is amply aware, Summary Judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *DeHart v. Horton*, 227 F.3d 47, 50 (3rd Cir. 2000). In considering a motion for summary judgment, a Court must draw all reasonable inferences from the underlying facts in the light most favorable to the non-moving party. The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. Once the moving party has met this initial burden, the non-moving party must present concrete evidence that supports each essential element of its claim. See *Skerski v. Time Warner Cable Company*, 257 F.3d 273, 278 (3rd Cir. 2001). It is well settled that where discovery is incomplete an application for summary judgment should

be denied or postponed, pending the completion of the essential discovery. See *Miller v. Beneficial Management Corp.*, 977 F.2d 834 (3rd Cir. 1992), *Costlow v. United States*, 552 F.2d 560, 564 (3rd Cir. 1977), *River Edge Associates v. Metropolitan Life Insurance Company*, 774 F. Supp. 897 (District of New Jersey 1991) and *Froid v. Berner*, 649 F. Supp. 1418 (District of New Jersey 1986).

In the matter of *Sames v. Gable*, 732 F.2d 49, 51 (3rd Cir. 1984) The Court reversed the grant of Summary Judgment where answers to certain discovery requests remained outstanding. In that matter, the Court noted, "Where the facts are in possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course. *Id.* (Quoting *Costlow v. United States*, 552 F.2d 552, 560, 564 (3rd Cir. 1977)). In *Miller v. Beneficial Management Corp.*, the Third Circuit Court relied upon this rationale in reversing a grant of Summary Judgment while discovery was outstanding. In *Miller,* the Court specifically noted that although a Rule 56 F Affidavit had not been filed, the issue of discovery had been raised in the briefs and that the Court's failure to postpone the motion pending the completion of discovery was an abuse of discretion. *Miller v. Beneficial Management Corp.*, 997 F.2d 834, 846 (3rd Cir. 1992).

In the case at bar, not only was discovery incomplete, it had not yet commenced. The issue of the incomplete status of discovery was raised at the District Court level. The decision of the Third Circuit Court of Appeals which is based upon a lack of evidence presented on behalf of the Petitioner, specifically expert evidence or other objective analysis of the scoring sheets at issue represents a gross

abuse of discretion and deviation from the accepted standards and procedures employed by our Courts.

The case at bar is analogous to the matter presented to the Courts in *Bankers Trust Company.* Essentially, the Court based its decision to grant summary judgment upon a lack of expert analysis provided by the Plaintiff. This is expert analysis which the Plaintiff was not permitted to obtain as discovery had not yet commenced. As a result, the Petitioner was never provided the opportunity to be heard on the critical and decisive allegations which go to the core of his Complaint. This denial violates the mandates of the Fifth Amendment requiring due process of law and as such, the Third Circuit's decision should be reversed and the matter remanded to the trial Court for further proceedings.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Third Circuit's Opinion submitted July 14, 2003, filed July 24, 2003 ..... App. 1

2. Judgment entered by the Third Circuit dated July 24, 2003, and certified as true on September 30, 2003 ..... App. 5

3. Opinion of the District Court filed September 3, 2002 ..... App. 7

4. Order from the Third Circuit denying rehearing dated September 22, 2003 ..... App. 25

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-3841

GARY J. MONTEFUSCO,

Appellant

v.

DEPARTMENT OF THE ARMY; LOUIS CALDERA, Secretary of the Army, as an agent of Department of the Army; EDWARD G. ELGART, Director of Acquistions [sic] Center, individually and as an agent of Department of the Army; WENDY MCCUTCHEON, individually and as an agent of Department of the Army; ANDREW DELLOMO, individually and as an agent of Department of the Army

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil No. 00-cv-05647
District Judge: Hon. William H. Walls

Submitted pursuant to Third Circuit LAR 34.1(a)
July 14, 2003
Before: McKee, Barry & Rosenn, *Circuit Judges*
(Filed: July 24, 2003)

OPINION OF THE COURT

McKee, *Circuit Judge*.

Gary J. Montefusco appeals the district court's grant of summary judgment in favor of the defendants and against plaintiff Montefusco in this civil rights action Montefusco brought against the defendants alleging a violation of Title VII of the Civil Rights Act of 1964. We will affirm.

Inasmuch as we write only for the parties who are familiar with the factual and procedural background of this dispute, we need not reiterate the circumstances or rulings leading to this appeal. The district court filed its opinion on September 3, 2002 explaining why summary judgment in favor of defendants and against plaintiff was appropriate. We have reviewed that opinion and conclude that we can add little to the legal analysis that Judge Walls set forth therein. However, we do not completely agree with the District Court's analysis of the equitable tolling issue. Equitable tolling permits the filing of an otherwise untimely claim when a defendant deliberately conceals information relevant to a plaintiff's legal claim, making it impossible for the plaintiff to realize the existence of the claim until after the limitations period has expired (unless the plaintiff should have known about the claim otherwise through due diligence).

In this case, Montefusco argues that he could not have known of the Government's alleged discriminatory motive until scoring sheets for the promotion exam were provided to him in 1999, after having repeatedly requested the scores from the Government since 1997. He alleges that the scores for some questions on his exam were erased and modified downward, while the scores of some African-American women were modified upward, thus providing evidence of discriminatory purpose.

The District Court, however, held that Montefusco should have inferred discriminatory intent based solely on his nonselection for promotion in 1997 and the selection of several minority women candidates, irrespective of the withheld scoring sheets. According to the District Court, the limitations period thus began at the moment his nonselection was announced. We disagree that the mere

selection of African-American women candidates over a white male candidate could, standing alone, reasonably give rise to an inference of racial discrimination. Rather, we hold that there is no evidence that the test sheets, containing the alleged suspicious erasures, were withheld willfully, and we will affirm on that basis.

In this connection, we observe that Montefusco has produced naught but his own lay analysis of the erasures and their import. We are constrained to resolve motions for summary judgment on reliable evidence. Here, there is ample evidence that scores were periodically erased and modified for innocent purposes after the initial scoring, based on re-evaluation by the scorers. Nonetheless, trustworthy evidence that these erasures systematically boosted the scores of one group and diminished the scores of another might present statistical proof of discriminatory motive. However, we are unwilling to allow this case to proceed to trial based exclusively on a plaintiff's own personal assessment that the erasures favored minority applications over his application, without any expert testimony – or for that matter, any *objective* assessment whatsoever – to ascertain the nature of the erasures, which applicants had scores erased, whether the scores were changed up or down, or the statistical significance of these alterations.

Absent any trustworthy evidence to show that there was a disproportionate number of erasures on the score sheets of Montefusco and two African-American women applicants, or that the scores were altered to Montefusco's detriment and to the two women's benefit, we cannot ascribe any nefarious purpose to the Government's withholding of the sheets. Equitable tolling, therefore, does not apply. Accordingly, the order of the district court dated

September 4, 2002, dismissing "all counts against defendants" is hereby affirmed.

TO THE COURT:

Please file the foregoing opinion.

By the Court,

/s/ Theodore A. McKee

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-3841

GARY J. MONTEFUSCO,

Appellant

v.

DEPARTMENT OF THE ARMY; LOUIS CALDERA, Secretary of the Army, as an agent of Department of the Army; EDWARD G. ELGART, Director of Acquistions [sic] Center, individually and as an agent of Department of the Army; WENDY MCCUTCHEON, individually and as an agent of Department of the Army; ANDREW DELLOMO, individually and as an agent of Department of the Army

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil No. 00-cv-05647
District Judge: Hon. William H. Walls

Submitted pursuant to Third Circuit LAR 34.1(a)
July 14, 2003
Before: McKee, Barry & Rosenn, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on July 14, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered September 5, 2002 be, and the same is, hereby affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against appellant.

ATTEST:

/s/ Patricia Dodszuweit
ACTING CLERK

DATED: July 24, 2003

Certified as a true copy and issued in lieu of a formal mandate on September 30, 2003

Teste: /s/ Marcia M. Waldron

Clerk, U.S. Court of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

GARY J. MONTEFUSCO, Plaintiff, v. DR. JOSEPH WESTPHAL, Secretary of the Army; EDWARD G. ELGART; WENDY MCCUTCHEON; and ANDREW DELLOMO, Defendants.	CIVIL ACTION No. 00-5647 (WHW) OPINION (Filed Sep. 3, 2002)

Walls, District Judge

This matter comes before the Court on Defendants' motions for summary judgment. Plaintiff Gary Montefusco filed his complaint on November 16, 2000. Defendants Edward Elgart, Wendy McCutcheon, and Andrew Dellomo (collectively, the "Army Defendants") have moved for summary judgment and/or dismissal in lieu of an answer.[1] The Defendant Secretary of the Army, Dr. Joseph Westphal,[2]

[1] Plaintiff does not oppose the Army Defendants' motion for summary judgment and has indicated to the Court that he acquiesced to the motion.

[2] Plaintiff initially filed suit against then-Secretary of the Army Louis Caldera in his official capacity as a party defendant. Since filing, however, Dr. Joseph Westphal has replaced Mr. Caldera as Secretary of the Army. By operation of law, Dr. Westphal is automatically substituted as party defendant in place of Mr. Caldera. Fed. R. Civ. P. 25(d)(1).

("Secretary") has also moved for summary judgment and/or dismissal in lieu of an answer. This Court has jurisdiction pursuant to 28 U.S.C. § 2000(e).

FACTS AND BACKGROUND

Plaintiff Gary Montefusco is a white male employed as a Contract Specialist, GS-1102-11, in the Acquisition Center, U.S. Army Communications-Electronics Command ("CECOM"), Fort Monmouth, New Jersey. (Supplemental Decl. of James B. Clark III [hereinafter "Suppl. Clark Decl."] Ex. O.) At some point before to May 1997, a memorandum entitled "Affirmative Employment Program for Minorities and Women, Report of Objectives and Action Items" was transmitted to the attention of Mr. Edward Elgart, a white male employed as the Director of the Acquisition Center, CECOM, at Fort Monmouth. (Pl. Ex. B; Suppl. Clark Decl. Ex. O at 2.) The memorandum identified a problem within the Acquisition Center due to the "manifest imbalance and conspicuous absence of some EEO group members in career program"; the stated objective was "[t]o reduce the manifest imbalance and improve conspicuous absence of the affected EEO groups." (Pl. Ex. B at 4.) The Acquisitions Department was specifically directed to "[i]ncrease the representation of any of the following groups by 5% (22) over the next year: Black males or females; Hispanic males or females; Asian Pacific males or females; Native American females." (*Id.*)

In April 1997, CECOM sought applicants for various GS-12 positions. Seventy-one people applied, and thirty applicants were deemed eligible and referred to interviews held from May 5-15, 1997. (*Id.* Ex. D.) Selectees were

determined based on the scores they received after answering ten knowledge-based questions during the interviews: a score above 60 earned the applicant a position. (*Id.* Ex. O at 2; Ex. C.) In addition, candidates were required to meet the "Dawia" education requirements or be "grandfathered".[3] (Pl. Br. Ex. C.) Plaintiff argues that the interview process is mere pretext for discrimination. (Pl.'s Response to Defendant's Local R. 56.1 Statement of Undisputed Facts ["Pl. Facts"] ¶ 3.) He contends that the scores of three female minorities were arbitrarily increased to a score above sixty while his score was arbitrarily decreased to a score below sixty. (*Id.*)

On May 26, 1997, twenty-six applicants were selected for promotion. Plaintiff had been interviewed but was not selected. (Suppl. Clark Decl. Ex. C & D.) The list of selectees was disclosed on May 27, 1997. (Pl. Facts ¶ 7.) Defendants Wendy McCutcheon, a white female employed as a GS-14 Supervisor procurement Analyst at CECOM's Acquisition Center, and Andrew Dellomo, a white male employed as a GS-13 Team Leader, Sector C at CECOM's Acquisition Center, comprised the interview panel and scored the interviews for the May 1997 selection. (Suppl. Clark Decl. Ex. C & O.) Defendant Elgart approved the final selections for promotion at a meeting in mid-May 1997. (*Id.* Ex. O at 2; Ex. Q at 29.)

Plaintiff alleges that Ms. McCutcheon and Mr. Dellomo approached Jane Calicari, one of the May 1997

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[3] In other words, a candidate was required to have 24 business-related college credits or 10 years experience in that department. (Suppl. Clark Decl. Ex. F at 11.) Plaintiff was grandfathered as he had more than 10 years experience. (Pl. Ex. A ¶ 8.)

interviewees, and indicated that if she consented to further her education, she would be promoted. (Pl. Ex. A ¶ 5.) She agreed, and her promotion was announced several days later. (*Id.*) Ms. Calicari relayed this information to the EEO investigator who interviewed her at Plaintiff's suggestion. (Suppl. Clark Decl. Ex. F at 11.) Ms. McCutcheon testified that she and Mr. Dellomo did in fact

> go out and talk[] to Ruby Wright and Jane Callicari [sic], to ask them, you know, that it's an important facet that, you know, we should continue our education. We had already made – It was dumb to go out and do that, to be honest with you. Because we had already made the selections, but we just wanted to make sure that they continued with their education because it was such an important part of . . . [o]ur career field.

(Suppl. Clark Decl. Ex. Q at 34.) Ms. McCutcheon indicated several times that "it was dumb" for them to seek out those candidates, but they wanted to emphasize the importance of continuing education. (*Id.* at 34-35.) She testified that they did not tell either candidate that her selection would be contingent upon her response to the question. (*Id.* at 35.)

On June 3, 1997, Plaintiff met with Ms. McCutcheon and Mr. Dellomo for a debriefing after his non-selection. (Pl. Br. Ex. A ¶ 7.) He alleges that the debriefing was "brutal" (Suppl. Clark Decl. Ex. S at 59) as they were "extremely critical of [him], bordering on belligerent" when they told him that he "performed very poorly in the interview" and encouraged him to "attend classes and acquire at least 24 business credits" (Pl. Br. Ex. A ¶ 7; *see also* Suppl. Clark Decl. Ex. S at 59, 77). Ms. McCutcheon concurred that the debriefing session became rather

"adversarial" and "at times a little nasty" due to the fact that they felt that Plaintiff arrogantly offered to "let you give me a position." (Suppl. Clark Decl. Ex. Q at 65-66; *see also* Ex. R at 44-45.) Plaintiff argues that he was therefore led to believe that he had been unfairly passed over for the promotion "solely" because he did not have 24 business credits. (*Id.* ¶¶ 8-9.) He inquired of the Personnel Office and was advised that discrimination based upon one's educational status is not protected and could not be addressed through the EEO; as such, he did not contact an EEO counselor at the time. (*Id.*) Plaintiff does not allege that he suspected race or sex discrimination at the time the promotions were announced in May 1997, although he worked with and knew the twenty-six successful applicants. (Pl. Facts ¶ 6; Pl. Br. Ex. D; Suppl. Clark Decl. Ex. S at 57-58; Def. Sec'y Reply Mem. at 6.) Defendant points out that by virtue of knowing exactly who the selectees were, he knew their race and gender and thus was in a position to allege race and sex discrimination at that time. (Def. Sec'y Reply Mem. at 6.)

In the meantime, Plaintiff learned that another employee, Mary Lynn Shindel, had applied and interviewed for another position and had also been passed over, and he became involved in the union grievance procedure that she had initiated to obtain the selection list for the May 1997 interviews. In July 1997, the union representative obtained "sanitized selection lists"[4] from the May 1997

[4] The Army determined that the Privacy Act prevented disclosure of the names and scores of affected employees; thus, the "sanitized selection list . . . depicts the relative scores for applicants." (Pl. Br. Ex. F.)

interviews (Pl. Br. Ex. F), although he had some difficulty obtaining them (*id.* Ex. E).

On August 12, 1997, Plaintiff was one of five people who interviewed for some additional GS-12 vacancies in the CECOM Acquisition Center. (Pl. Facts ¶¶ 10-11.) As in May 1997, selectees in August 1997 were determined based on the scores applicants received after answering ten knowledge-based questions during the interviews: a score of 75 earned the applicant a position. (Suppl. Clark Decl. Ex. E at 2; Ex. F at 2.) Plaintiff did not receive a score of 75 and was not selected. (*Id.* Ex. A; Ex. E at 2.) He was notified of his non-selection on August 21, 1997.

On September 4, 1997, Plaintiff contacted the EEO Office alleging that his non-selection in August 1997 was the result of age discrimination and an improper, unofficial Dawia requirement that selectees have 24 business-related college credits.[5] (*Id.* Ex. A; Ex. E at 4.) Plaintiff alleged that the August 1997 interviews were conducted so that two interns could be selected who had not been selected following the May 1997 interviews, and that Mr. Elgart decided to hold this second round of interviews after meeting with Ms. McCutcheon and Mr. Dellomo on May 16, 1997. (*Id.* Ex. F at 3.) After the EEO Counselor issued his final report on December 2, 1997 (*id.* Ex. E), Plaintiff filed a formal EEO administrative complaint regarding his August 1997 non-selection and alleged that Defendants "conspired" to prevent certain individuals from promotion based on their educational background; the

[5] Plaintiff did not include his May 1997 non-selection in this complaint to the EEOC.

interviewing officials "blackmailed" certain certified applicants who did not have 24 business credits; one supervisor "tampered" with a crucial witness and tried to sway her testimony in favor of management; and the August 1997 interviews were orchestrated in order to accommodate and promote two young interns (under 40) who were disqualified from the May 1997 selection due to a technicality. (*Id.* Ex. J.)

The EEO investigator conducted a fact-finding conference on July 20, 1998, at which Plaintiff testified under oath. (*Id.* Ex. G.) On August 24, 1998, the EEO investigator issued his Report of Investigation ("ROI"), finding no discrimination. From August 1997 through February 1999, Plaintiff repeatedly requested copies of the scoring sheets from both the May 1997 and August 1997 interviews, but each request was denied. (Pl. Br. Ex. A ¶¶ 13-15.) Finally, on February 22, 1999, Plaintiff made a motion to compel production of the scoring sheets. The EEO Administrative Law Judge ("ALJ") assigned to consider Plaintiff's Appeal of the ROI on the August 1997 non-selection granted Plaintiff's motion to compel on April 26, 1999 and ordered Defendant Secretary to provide copies of the May 1997 interview scoring sheets to Plaintiff. (Suppl. Clark Decl. Ex. H & Ex. I.) However, on January 24, 2000, the EEO ALJ determined that there had been no discrimination in Plaintiff's August 1997 non-selection. (*Id.* Ex. L.) On March 6, 2000, the Army issued its Final Agency Decision ("FAD") adopting the findings of the ALJ. (*Id.* Ex. M.) Plaintiff did not file a judicial complaint based on the August 1997 non-selection.

Plaintiff received the scoring sheets from Defendant on May 7, 1999 and discovered that they contained some erasure marks. (Pl. Br. Ex. A ¶ 17.) He alleges that these

marks, which are indiscernible on the copies submitted to the Court, show that "several individual scores had been erased and modified following the interviews" and are evidence that "the scores of three female minorities had been increased" while his score had been decreased. (*Id.*) Ms. McCutcheon and Mr. Dellomo testified that the erasure marks represent their attempt to be fair over the course of several days of interviews, and that they generally would discuss the merits of each candidate immediately following each interview. (*Id.* Ex. Q at 21-25; Ex. R at 16-30.) Mr. Dellomo testified,

> [Y]ou'll see erasures. . . . [because] [w]e went back afterwards after, maybe the end of the day or at the end of it all, in all fairness to everyone . . . and agreed to see if we had given the same number of points to one response and compared it to another, and, say, you know, so and so said such. Were we fair in allocating seven to this person and six to this. After all, this person said this . . . . and basically, it was the intention . . . to simply be fair.

(*Id.* Ex. R at 17-18.) Ms. McCutcheon similarly stated,

> We'd go through each question and we'd say, okay. This is what they said. And we'd talk a little bit, and Andy [Dellomo], he'd say one thing, and . . . sometimes we agreed, Sure. Okay. That's a good one. Sometimes . . . he'd say seven, and I'd say . . . eight and we'd look at it and say, yeah. Okay. Let's do that.
>
> There was times [sic] one of us would write a number and we'd end up writing it or erasing it because . . . [w]e were trying to be consistent . . . . what we were trying to do is be fair among all the candidates.

> So what we do is . . . we'd say, okay. I think this person deserves a five, and we'd look at it and say, yeah. But then . . . we might go to a previous candidate and said [sic], you know what? I don't know if that's really fair because . . . this is what they said. These are some of the things they said, and . . . we only gave them a four, but yet this person's given us a lot less and we're talking about five, so we tried to equalize it and make it fair.
>
> So we tried to assess that we were . . . being consistent with our scores.

(*Id.* Ex. Q at 22-23.)

On May 11, 1999, Plaintiff contacted the Army EEO office alleging discrimination in his non-selection in May 1997. (*Id.* Ex. N.) Plaintiff did not file a formal EEO Complaint based on his May 1997 non-selection until September 7, 1999. (*Id.* Ex. B.) The EEO conducted a fact-finding conference on this complaint on March 22-23, 2000. (*Id.* Ex. O.) Ms. McCutcheon, Mr. Dellomo, and Plaintiff gave sworn testimony. (*Id.* Ex. Q, R & S.) The EEO investigator issued a recommended finding of no discrimination, and the FAD issued in connection with plaintiff's May 1997 non-selection also found no discrimination. (*Id.* Ex. O & Ext. T.)

Defendant Secretary of the Army argues that he is entitled to dismissal and/or summary judgment on Counts One and Two (the only remaining claims in the case) Because (1) Plaintiff failed to exhaust his administrative remedies; and/or (2) Plaintiff cannot show that Defendant's actions were pretextual. Plaintiff contends that (1) there are disputed material issues of fact precluding summary judgment for Defendant; (2) the Title VII time

limits for filing notice with the EEOC should be equitably tolled and/or estopped, and therefore Defendant's motion should be denied.

DISCUSSION

Plaintiff Failed to Exhaust His Administrative Remedies and Therefore the Claims Against Defendant Secretary must be dismissed.

To present a viable claim of discrimination under Title VII, a plaintiff must first timely exhaust those administrative remedies which are available to him. *Brown v. Gen. Serv. Admin.* 425 U.S. 820, 829-32 (1976). "Although not an absolute jurisdictional prerequisite, absent unusual circumstances, plaintiff's failure to exhaust means the complaint does not state a claim upon which relief can be granted." *Metsopulos v. Runyon,* 918 F. Supp. 851, 857 (D.N.J. 1996) (citing *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982) and *Hornsby v. United States Postal Serv.,* 787 F.2d 87, 90 (3d Cir. 1986)).

Congress created an elaborate remedial and integrated system of administrative and judicial review that is exclusive and preemptive. *Brown,* 425 U.S. at 828-29. A federal employee claiming that he is the victim of discrimination must follow the administrative procedures set forth in 29 C.F.R. § 1614. An aggrieved employee must communicate with an EEO counselor to request informal counseling within 45 days from the date of the alleged incident of discrimination. 29 C.F.R. § 1614.105(a). If informal counseling is unsuccessful in resolving the matter, the aggrieved employee may file a formal complaint with the agency within fifteen days of receiving a notice of final interview. 29 C.F.R. § 1614.106(b). After 180 days have

passed with no agency action or within 90 days of the agency issuing a final decision, the aggrieved employee may file suit in federal court. 29 C.F.R. § 1614.407. The Court notes that acceptance and investigation of an untimely complaint by a federal agency does not waive the complainant's failure to comply with the prescribed time periods. *Bruno v. Brady*, Civ. A. No. 91-2605, 1992 WL 57920, *3 (E.D. Pa. Mar. 16, 1992) (stating,

> Those courts addressing the issue are in accord with this determination, holding that mere acceptance and investigation of a federal employee's complaint does not constitute waiver. *See Oaxaca v. Roscoe,* 641 F.2d 386, 390 (5th Cir. 1981); *Brown v. Marsh,* 777 F.2d 8, 15 (D.C. Cir. 1985); *Boyd v. United States Postal Service,* 752 F.2d 410, 414 (9th Cir. 1985); *De Medina v. Reinhardt*, 444 F. Supp. 573, 577 (D.D.C. 1978); *see generally* Employment Discrimination Charge, 57 A.L.R. Fed. 116 (1982).);

see also Belgrave v. Pena, 254 F.3d 384, 387 (2d Cir. 2001) (quoting *Bruno* and expressly adopting the same rule). This Court agrees and relies especially on the policy articulated by the court in *Brown v. Marsh,* "Since we think it consistent with public policy for an agency to voluntarily investigate allegations of . . . discrimination even when not bound to do so, we are loath to hold that mere investigation without more constitutes a binding waiver of an agency's right to raise the timeliness issue." 777 F.2d at 15.

The procedural requirements set forth in 29 C.F.R. § 1614 are a condition to the waiver of sovereign immunity which allows federal employees to sue the government, and accordingly, they must be strictly construed. *Irwin v.*

Dept. of Veterans Affairs, 498 U.S. 89, 94 (1990). The Third Circuit has held that "a claim filed even one day beyond this ninety day window is untimely and may be dismissed absent a[ ] [recognized] equitable reason for disregarding this statutory requirement." *Figueroa v. Buccaneer Hotel, Inc.,* 188 F.3d 172, 176 (3d Cir. 1999) (citing *Mosel v. Hills Dept. Store, Inc.,* 789 F.2d 251, 253 (3d Cir. 1986)). The Supreme Court noted in *Irwin* that "[f]ederal courts have typically extended equitable relief only sparingly." 498 U.S. at 96.

In *Oshiver v. Levin, Fishbein, Sedran & Berman,* the Third Circuit addressed a situation similar to this case and identified two doctrines that could apply to extend the time period the aggrieved employee had in which to file her charges of discrimination: the discovery rule and the equitable tolling doctrine. 38 F.3d 1380, 1385 (3d Cir. 1994).

A. Discovery Rule

As a general rule, the statute of limitations begins to run when the plaintiff's cause of action accrues. *Id.* "[T]he accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured." *Id.* Therefore, the discovery rule "postpone[s] the beginning of the statutory limitations period from the date when the alleged unlawful employment practice occurred, to the date when the plaintiff actually discovered that he or she had been injured." *Id.* at 1386.

With regard to Title VII claims, "the 'polestar' of the discovery rule is not the plaintiff's actual knowledge of injury, but rather whether the knowledge was known, or

through the exercise of reasonable diligence, knowable to the plaintiff." *Id.* The *Oshiver* court specifically addressed the question whether the statutory period begins to run "upon a plaintiff's learning that he or she has been discharged from employment" or whether it begins to run "only after a plaintiff comes to realize that the discharge constituted a legal wrong." *Id.* The court reiterated that "*a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.*" *Id.* (emphasis added). In that case, the court "ha[d] no difficulty in concluding that for the purposes of the discovery rule," the aggrieved employee "'discovered' the injury on the very date the defendant [employer] informed her of her discharge." *Id.* at 1390-91. The court stated that although the plaintiff "may have been deceived regarding the underlying motive behind her discharge," it was "irrelevant for purposes of the discovery rule." *Id.* at 1391.

B. Equitable Tolling

The Supreme Court has specified two situations meriting equitable tolling: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin,* 498 U.S. at 96 (internal notes and citations omitted). However, "where the claimant failed to exercise due diligence in preserving his legal rights," courts "have generally been much less forgiving in receiving late filings." *Id.* The Third Circuit has indicated that courts should "approach the doctrine warily" and employ equitable tolling only in extraordinary

and limited circumstances. *Seitzinger v. Reading Hosp. & Med. Ctr.,* 165 F.3d 236, 240 (3d Cir. 1999).

In *Oshiver,* the Third Circuit specifically considered the principle of equitable tolling as it applies to the accrual date of a plaintiff's claim and under what circumstances the filing date may be tolled. 38 F.3d at 1387-90. The court stated that in the context of employment discrimination cases, "the equitable tolling doctrine may excuse the plaintiff's non-compliance with the statutory limitations provision at issue when it appears that (1) the defendant actively misled the plaintiff respecting the reason for the plaintiff's [adverse employment action], and (2) this deception caused the plaintiff's non-compliance with the limitation provision." *Id.* at 1387. Because a party should not be permitted to profit from its own wrongdoing, a defendant who intentionally misled the plaintiff with regard to the cause of action is not allowed to benefit from the statute of limitations defense. *Id.* at 1388-89. In other words, where a defendant has "lulled the plaintiff into inaction, the defendant may not profit by such wrongful conduct through invocation of the statute of limitations defense." *Id.* at 1389 (citing *LaVallee Northside Civic Ass'n v. Coastal Zone Mgmt.,* 866 F.2d 616, 625 (3d Cir. 1989)). The court concluded against the backdrop of these equitable considerations that

> where a defendant actively misleads a plaintiff regarding the reason for the plaintiff's dismissal, the statute of limitations will not begin to run, that is, will be tolled, until the facts which would support the plaintiff's cause of action are apparent, or should be apparent to a person with a reasonably prudent regard for his or her rights.

Id. Finally, the court noted that the doctrine of equitable tolling, as it applied in that case (and as it applies here "presumes claim accrual and steps in to toll . . . the running of the statute of limitations in light of established equitable considerations." *Id.* at 1390.

C. Application

As in *Oshiver,* there is no question that, according to the discovery rule, Plaintiff "discovered" the injury on or about May 27, 1997, "the very day" he learned that he was not selected for promotion. *See* 38 F.3d at 1391. At that time, Plaintiff was aware (1) that he had been injured, that is, not promoted, and (2) that this injury had been caused by another party's conduct. *See id.* "That [Plaintiff] may have been deceived regarding the underlying motive behind [his] [non-selection] is irrelevant for the purposes of the discovery rule." *Id.* In addition, "a claim accrues in a federal cause of action upon awareness of *actual injury*, not upon awareness that this injury constitutes a legal wrong." *Id.* at 1386 (emphasis added). So, just as in *Oshiver,* "the discovery rule offers [Plaintiff here] no relief in relation to the timeliness of the filing of his discriminatory [non-selection] claim." *Id.* at 1391. Plaintiff's discriminatory non-selection action accrued on May 27, 1997; he waited approximately two years before filing his administrative complaint. *See id.*[6]

[6] Plaintiff does not contend that he was unaware of the statute of limitations for these types of claims although his papers make reference to the statutory provision providing an equitable extension in such a case. (*See* Pl. Br. at 8.)

It cannot be said that Plaintiff exercised the reasonable diligence required by the discovery rule in connection with his discovery of the alleged race and sex discrimination. *See id.* Plaintiff knew the race and sex of the successful candidates from the May 1997 interviews, but he nonetheless alleged only that he had been the victim of unactionable *educational* discrimination. (Pl. Br. Ex. D; Pl. Facts ¶ 8.) Indeed, he even chose not to pursue his claim with the EEOC because he recognized that "education is not a protected class." (Pl. Br. Ex. A ¶ 9.) Despite the fact that Plaintiff was aware of the race and gender of each selectee as early as May 1997, he argues disingenuously that he "had no idea that there had been any racial or gender-based discriminatory motives involved in the interviewing and promotion process" until he received the scoring sheets in May of 1999. (Pl. Br. at 11.) Thus, the discovery rule affords Plaintiff no relief in connection with the timing of the filing of his failure to promote claim.

Because Plaintiff alleges that Defendant actively misled him and hindered his efforts to obtain copies of the scoring sheets, the Court next considers whether the doctrine of equitable estoppel may "step in to toll the running of the statute of limitations" on Plaintiff's discriminatory non-selection claim. *Oshiver,* 38 F.3d at 1390 & 1391 n.10. As stated, "the equitable tolling doctrine may excuse the plaintiff's non-compliance with the statutory limitations provision at issue when it appears that (1) the defendant actively misled the plaintiff respecting the reason for the plaintiff's [adverse employment action], and (2) this deception caused the plaintiff's non-compliance with the limitation provision." *Id.* at 1387.

Plaintiff argues that for two years, Defendant "actively, willfully, and purposely refused to produce the scoring sheets

in an attempt to prevent Plaintiff from establishing his alleged educational and age discrimination claims (Pl. Br. at 10.) He contends that he was unaware of Defendant's alleged race and gender discrimination until he received copies of the May 1997 score sheets in May 1999. (*Id. at 11.)* However, Plaintiff misconstrues his "injury" when he argues that Defendant's refusal to provide the scoring sheets caused his non-compliance with the statutory limitations period. Plaintiff's injury is indisputably his non-selection for the position in May 1997; and Defendant did not mislead him as to that information. Plaintiff learned in May 1997 that he was not selected at the same time he learned who was selected, and he knew the selectees' race and gender as well. (Pl. Br. Ex. D; Suppl. Clark Decl. Ex. S at 57-58.)[7] Even assuming that Defendant acted in bad faith by refusing to produce the score sheets until 1999,[8] Plaintiff cannot be heard to argue that he did not suspect Defendant's alleged racially and sexually discriminatory motives

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[7] The Court is also aware that Plaintiff argued throughout the EEO fact-finding process in 1998 and 1999 that he suspected that the May 1997 selection process was part of an overall discriminatory atmosphere at CECOM. (Def. Sec'y Reply Mem. at 11.) Plaintiff argued in 1998 that he was aware of a "pattern of discrimination and abuse of power" that he believed existed in May 1997. (Suppl. Clark Decl. Ex. J at 1.) Moreover, Plaintiff knew that the EEO could not consider educational discrimination and yet he testified at the EEO hearing that the interview questions were "just a vehicle for discrimination." (*Id.* Ex. G at 14.) Finally, Plaintiff testified in 1998 that "*one of the ways*" in which Defendant discriminated was by "remov[ing] people [from the list] who did not have 24 business credits," which necessarily implies that he suspected other forms of discrimination in addition to education. (*Id.* at 20 (emphasis added).)

[8] The Court notes, however, that Defendant was not obligated to turn over the actual scoring sheets to Plaintiff until the ALJ ordered production of those documents in April 1999.

until May 1999, almost two years after the expiration of the period he had to contact the EEOC. (Pl. Br. at 11.) It is clear that Plaintiff "failed to exercise due diligence in preserving his legal rights." *Irwin,* 498 U.S. at 96. Because there is no basis for equitable tolling in this matter, the Court need not reach the merits of Defendant Secretary's summary judgment motion. Plaintiff's Title VII claims must be dismissed for failure to exhaust his administrative remedies before to filing suit.

CONCLUSION

For the foregoing reasons, Defendant Secretary's motion for summary judgment and/or dismissal is GRANTED, and the Army Defendants' unopposed motion for summary judgment and/or dismissal is also GRANTED.

/s/ William H. Walls, U.S.D.J.
WILLIAM H. WALLS,
U.S.D.J.
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-3841

GARY J. MONTEFUSCO,

Appellant

v.

DEPARTMENT OF THE ARMY; LOUIS CALDERA, Secretary of the Army, as an agent of Department of the Army; EDWARD G. ELGART, Director of Acquisitions Center, individually and as an agent of Department of the Army; WENDY MCCUTCHEON, individually and as an agent of Department of the Army; ANDREW DELLOMO, individually and as an agent of Department of the Army

SUR PETITION FOR PANEL REHEARING

BEFORE: McKEE, BARRY & ROSENN, *Circuit Judges*

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for panel rehearing is hereby **DENIED**.

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Hon. Theodore A. McKee
Circuit Judge

DATED: SEP 22 2003
CRG/cc: GJG
JBC